CASE NO. 99-11229

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

D.E. Rice, Trustee for the Rice Family Living Trust;
KAREN RICE, Trustee for the Rice Family Living Trust

Plaintiffs – Appellants

v.

HARKEN EXPLORATION COMPANY

Defendant – Appellee

APPEAL FROM UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS (AMARILLO DIVISION)

BRIEF FOR AMICI CURIAE IN SUPPORT OF APPELLEE ON BEHALF OF INDEPENDENT PETROLEUM ASSOCIATION OF AMERICA TEXAS OIL AND GAS ASSOCIATION TEXAS INDEPENDENT PRODUCERS AND ROYALTY OWNERS ASSOCIATION AND THE NORTH TEXAS OIL & GAS ASSOCIATION SUPPORTING AFFIRMANCE OF THE DISTRICT COURT

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CERTIFICATE OF INTERESTED PERSONS

Pursuant to Fifth Circuit Rule 28.2.1, the undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

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CASE NO. 99-1129

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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KAREN RICE, Trustee for the Rice Family Living Trust

Plaintiffs – Appellants

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BRIEF FOR AMICI CURIAE IN SUPPORT OF APPELLEE ON BEHALF OF INDEPENDENT PETROLEUM ASSOCIATION OF AMERICA TEXAS OIL AND GAS ASSOCIATION TEXAS INDEPENDENT PRODUCERS AND ROYALTY OWNERS ASSOCIATION AND THE NORTH TEXAS OIL & GAS ASSOCIATION SUPPORTING AFFIRMANCE OF THE DISTRICT COURT

QUESTIONS PRESENTED

I. Whether the District Court's summary judgment ruling should be affirmed without the Court of Appeals having to decide whether the Oil Pollution

Act of 1990 (OPA) extends from the oceans and coastal waters all the way to Amarillo, Texas because appellants' sworn interrogatory responses do not seek damages for contamination of surface waters and thus do not seek relief which would be cognizable even under the Clean Water Act.

II. Whether the Oil Pollution Act of 1990 extends to the alleged remote inland contamination of land and groundwater near Amarillo, Texas which is at issue in this proceeding.

INTEREST OF AMICUS CURIAE

Amici curiae submit this brief pursuant to Fed. R. App. P. 29, Local Rule 29, and the permission of this Court as confirmed by undersigned counsel's March 22, 2000 letter to the case manager. As noted therein, all parties to this appeal have consented to the filing of this *amicus* brief on April 28, 2000, on behalf of the following associations:

The Independent Petroleum Association of America

The Texas Oil and Gas Association

Texas Independent Producers and Royalty Owners Association

North Texas Oil & Gas Association

Introduction

Amici represent more than 8,000 U.S. independent explorers and producers of oil and natural gas. The cost and risk of ensuring adequate domestic supply of oil and gas would be substantially increased if this Court were to hold that the OPA, and its attendant strict liability and extraordinary relief provisions, extends to the remote inland property and groundwater at issue in this case. Thus, the *amici* have an interest in ensuring that this Court properly restricts the scope of the Oil Pollution Act of 1990 to the purpose intended by Congress. The *amici* also have an interest in ensuring that the Court decide only matters which are required by this dispute.

The extraordinary relief provided by the OPA was never intended to reach the minor spills which can occur in the course of oil and gas exploration and production in places like Amarillo, Texas and other remote interior regions of the United States. Moreover, the application of the OPA to the subject operations would result in a threat of potential liabilities that could certainly have the effect of deterring production activities which are in the national interest.

Here plaintiffs rather incredibly claim more than $38 million in damage with regard to property purchased only three years ago for $255,000. As appellee stated in its summary judgment brief to the District Court: "This case is actually about a man who bought a piece of property in the Texas Panhandle three years ago for

$255,000, knowing that there had been oil and gas operations on that property for some 60 to 70 years, who apparently now wants the Court to supervise [appellee] as it pays $40 million to filter his ground water, remove the accumulated oil and saltwater contamination of the last six or seven decades, and replace it with fresh clean soil and vegetation." (Defendant-Appellee's Reply Brief in Support of Motion for Summary Judgment at 4-5.) This goes well beyond Texas law limiting damages to property value and is not what Congress intended when it enacted the OPA in response to massive tanker spills in the coastal wasters of the United States.

Description of Amicus Associations

The Independent Petroleum Association of America (IPAA) is the national association which represents 8,000 independent crude oil and natural gas explorers and producers located throughout the United States. They are located in Texas, Louisiana, Florida, Mississippi, California, Colorado, Illinois, Kansas, Kentucky, Michigan, Montana, Nebraska, New Mexico, New York, North Dakota, Ohio, Oklahoma, Pennsylvania, South Dakota, Tennessee, Virginia, West Virginia and Wyoming. IPAA's members are not involved in marketing or refining.

Based on a 1998 IPAA survey, the typical independent explorer/producer has been in business 24.5 years and employs 11 full-time and 2 part-time people. 293,100 persons were employed in the exploration and production segment in

1999, compared to 339,200 in 1998. 470,000 jobs have been lost in this sector since the early 1980's.

IPAA is based in Washington, D.C. and operates in close cooperation with national, state and regional associations which represent diverse segments of the domestic oil and gas industry. IPAA is dedicated to ensuring a strong, viable domestic oil and natural gas industry, recognizing that an adequate and secure supply of energy is essential to the national economy.

The Texas Independent Producers and Property Owners Association (TIPRO) is based in Austin, Texas. TIPRO was established in 1946 and is committed to promoting the interests and welfare of independent oil and gas operators, working interest owners, royalty owners, and those businesses that provide services to the energy industry. It is the largest statewide association representing independent oil and gas producers and royalty owners. TIPRO also is involved with cutting edge technology, as reflected in its joint Regional Technology Transfer Program with the Gas Research Institute.

The Texas Oil and Gas Association (TOGA) is based in Austin, Texas. TOGA is a general, multi-purpose trade association which represents all segments of the oil and gas industry operating in Texas. Collectively, they produce approximately 92% of all the oil and natural gas produced in Texas, they operate

the vast majority of pipeline mileage, and they are responsible for about 95% of the state's refining capacity.

The North Texas Oil and Gas Association (NTOGA) is based in Wichita Falls, Texas. NTOGA was established in 1930 and has approximately 1,350 members. 70% of the membership is involved in the exploration and the production of oil and natural gas. The remaining 30% is involved in other aspects of the oil and gas industry. NTOGA primarily represents members in the Dallas/Fort Worth area north to the Red River.

ARGUMENT

I. APPELLANTS' SWORN INTERROGATORY RESPONSES DO NOT ALLEGE DAMAGES FOR CONTAMINATION OF SURFACE WATER, SO THE SUMMARY JUDGMENT MUST BE AFFIRMED EVEN IF ONE ASSUMES, ERRONEOUSLY, THAT THE SCOPE OF THE OIL POLLUTION ACT OF 1990 IS CO-EXTENSIVE WITH THAT OF THE CLEAN WATER ACT

Appellants argue that the use of the same term, "navigable waters," in the Oil Pollution Act of 1990 and in the Clean Water Act means that the statutes have the same scope. The lower court correctly rejected this position. However, separately, even assuming that the OPA extends to the same "waters" as the CWA, appellants have no claim.

As appellee explains in its brief (at 22-27), the Clean Water Act does not extend to soil and groundwater contamination. Similarly, the United States' *amicus* brief points to EPA's statement that, in both the Clean Water Act and the OPA,

"the term navigable waters refers to any natural *surface* water in the U.S." (Id. at 18; emphasis supplied.) The United States' *amicus* brief likewise refers to U.S. Coast Guard guidance which "explains that OPA applies broadly to all *surface* waters." (Id.; emphasis supplied.)

Appellants' sworn interrogatory responses only allege damage to soil and groundwater, not surface water. (See Appellee's Brief, at 23.) Appellants' Reply Brief makes no mention of these interrogatory responses, apparently hoping that they will be forgotten if they are ignored. However, the responses which appellants ignore are significant. They demonstrate that, even if appellants were correct that the term "navigable waters" as used in the OPA reaches as far as it does under the Clean Water Act, this would make no difference because appellants' claim falls outside the scope of the Clean Water Act as well. Accordingly, based on the facts of this case and appellants' sworn statements, there is no need for this Court to address the applicability of the OPA to the soil and groundwater contamination at issue here. Briefly stated, this Court need not address whether the OPA was intended to reach all the way to Amarillo, Texas.

On pages 11-12 of their Reply Brief, appellants assert that "most courts agree" that the Clean Water Act applies to groundwater "if there is a hydrogeological connection between the groundwater and surface water." To the contrary, as appellee explains in its brief, most courts do not agree. (See Appellee

Brief, at 24-27.) Moreover, even the cases which appellants cite require more than a mere hydrogeological connection. See Williams Pipe Line Co. v. Bayer Corp., 964 F. Supp. 1300, 1319-20 (S.D. Iowa 1997) (CWA regulates any pollutants that "enter [surface] waters either directly or through groundwater"). Here there is no evidence that any contaminants have "entered" or "reached" any arguably navigable surface waters.

We also note that, although appellants repeatedly state that the alleged contaminants will reach the Canadian River if not removed, they point to no summary judgment evidence that this is true. Appellants either provide no citation at all for this proposition (Reply Brief at 2, 13), or they cite to portions of the record that say no such thing (Reply Brief at 7, 13). Appellants' unsupported allegations that contaminants may eventually reach the Canadian River -- without evidence -- are not sufficient to invoke the provisions of the OPA.

In addition, appellants seriously misstate the burden of proof regarding who has to prove that certain damages "result from" a discharge. By characterizing appellee's argument regarding no causation as "confused" (Reply Brief, at 17), appellants apparently hope that the Court will ignore the reality in this summary judgment record: they have failed to provide this Court with any evidence that appellee caused the alleged damages about which they complain. Appellants claim that they are excused from proving causation because appellee has not proved that

appellants' alleged damages and removal costs were caused solely by an act of God, an act of war, or an act or omission of a third party. (Reply Brief, at 27.) Obviously, it is appellants who are "confused" regarding the burden of proof.

Under the OPA, a responsible party is only liable for removal costs and damages that "result from" a discharge of oil into or upon navigable waters from its facility. 33 U.S.C. § 2702(a). Therefore, the burden is on appellants to prove that the damages and removal costs about which they complain "resulted from" an alleged discharge from appellee's facility. Only then does the burden shift to the responsible party under Section 2702(d) to prove that the spill itself was caused by an act of God, an act of war, or an act or omission of a third party. Id.

Under appellants' characterization of the law, any time there is a discharge from a vessel or facility, the responsible party for that vessel or facility would have to prove that it did not cause whatever preexisting pollution or contamination is in the area. This type of burden would be unreasonable and is contrary to the plain intent of the statute. Causation is an essential element of appellants' claims, Appellee has pointed out the absence of evidence on that element. Appellants have failed to come forward with any admissible evidence to support a judgment in their favor on that issue. Therefore, appellee was entitled to summary judgment on this ground alone. Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986).

II. THE OPA DOES NOT EXTEND TO AMARILLO

The United States' *amicus* brief makes much ado about the purported equivalence between the OPA and the Federal Water Pollution Control Act (Clean Water Act). However, this argument does not comport with common sense. Why would Congress need to enact the OPA if it were intended to address what is already covered by the FWPCA?

The United States' argument that the scope of the OPA is as broad as the Clean Water Act centers on the discussion of the term "navigable waters" in the Conference Report for the OPA. (Brief of the United States at 15.) However, that Conference language was not included in the statute. When a conflict exists between a statute and its legislative history, the statute prevails. Matter of Sinclair, 870 F.2d 1340 (7th Cir. 1989).

In addition, as explained in appellee's brief (at 15-20), the term is used differently in the two statutes. In any event, Section 2702 of the OPA imposes liability only for removal costs and damages that result from discharge or a substantial threat of discharge into or upon navigable waters. As the District Court held, the oil production facility in this case is "over 500 miles from any ocean or shoreline. . ." Rice v. Harken Exploration Co., No. 97-402 (N.D. Tex. Sept. 30, 1999), at 11. Thus, there is no threat to "navigable waters."

On page 11 of their Reply Brief, appellants again misstate the applicable provisions of the OPA. Appellants claim that "under the OPA, the polluter is liable not only for discharges into 'waters of the United States,' but also for discharges that substantially threaten 'waters of the United States.'" Appellants are wrong. The statute actually provides that it applies to "a responsible party for a vessel or a facility from which oil is discharged, or which poses the substantial threat of a discharge of oil, into or upon the navigable waters." 33 U.S.C. § 2702(a). The "substantial threat" language pertains to the threat of discharge, not the threat of contamination. Here, there is no evidence that appellee threatens to discharge oil into or upon any navigable water. The "plain language" to which appellants refer on page 11 of their Reply Brief -- that under the OPA, an alleged polluter is liable 'for discharges that substantially threaten 'waters of the United States' -- is not found anywhere in the statute. Through a sleight-of-hand interpretation of the statutory provisions, appellants again hope to construe the navigable waters requirement right out of the statute, but appellants' wishful thinking does not make it so.

We also note that the Conference Report makes it quite clear that the OPA has the important but limited objective of protecting against oil discharges akin to those which occurred with the *Exxon Valdez* off the coast of Alaska and with other large spills off the coast of California and in the Gulf of Mexico:

> Section 311(c) (2) of the FWPCA, as amended by the Conference substitute, replaces 311(d) of that Act to require the President to direct all Federal, State and private actions to remove a discharge or prevent a substantial threat of discharge if the discharge is of such size or character as to be a substantial threat to the public health or welfare of the United States. The public health or welfare of the United States includes, but is not limited to fish, shellfish, wildlife, other natural resources, or public and private shorelines and beaches. Examples of such spills that have posed such a substantial threat to the public health or welfare include the spills from the *Exxon Valdez* in Alaska's Prince William Sound and from the *American Trader* in California's coastal waters, and the spill and substantial threat of a larger spill from the *Mega Borg* in the waters of the Gulf of Mexico.

(Id. at 824-825; emphasis supplied.)

The United States Supreme Court recently described the purpose and intent of the Ports Waterways Safety Act of 1972 (PWSA) and of the OPA in United States v. Locke, 120 S.Ct. 1135 (2000). Writing for the unanimous court, Justice Anthony Kennedy noted that "[t]he maritime oil transport industry presents ever present, all to real dangers of oil spills from tanker ships, spills which could be catastrophes for the marine environment." Id. at 1140. Justice Kennedy further noted that Congress enacted the PWSA in response to the spill of the supertanker *Torrey Cannon* of the coast of Cornwall, England in 1967. Id. In addition, the Court found that "[t]he critical provisions of the PWSA described above remain operative, but the Act has been amended, most significantly by the . . . OPA, enacted in response to the *Exxon Valdez* spill." Id. at 1144. Thus, the Court made

clear that the OPA's limited objective is to protect against oil discharges such as those caused by the *Torrey Cannon* and *Exxon Valdez*.

The only case cited by appellants in their Reply Brief argument that they have a cause of action under the OPA is a 21-year-old Tenth Circuit case which was decided long before the OPA was enacted. (Reply Brief, at 9.) In sharp contrast, as a Pennsylvania federal District Court explained just a few years after the OPA was enacted, the OPA is of "limited geographic scope" and it was "[c]oncern about the integrity of the nation's shorelines and coastal waters and about the catastrophic and far-reaching consequences of oil spills [which] led Congress to pass the OPA. …" Sun Pipe Line Co. v. Conewago Contractors, Inc., 39 Env't Rep. Cas. (BNA) 1710, 1994 WL 539326 (M.D. Pa. Aug. 22, 1994), at 5. The Pennsylvania court further stated, accompanied by detailed reference to the OPA's legislative history:

> [T]he impetus behind passage of the OPA was unquestionably the Exxon Valdez disaster and 'other high profile' oil spills which followed it, including the American Trader incident in California, the Mega Borg explosion, and the oil fire in the Gulf of Mexico.

Id. In light of the foregoing, it was entirely appropriate for this Circuit to observe that it is "highly questionable" whether the OPA was intended to apply to discharges into two creeks that flow into a bay on the Gulf of Mexico. Avitts v. Amoco Production Co., 840 F. Supp. 1116 (S.D. Tex. 1994), vacated and remanded, 53 F.3d 690 (5th Cir. 1995).

While the statement was dictum, one cannot discount the significance that three members of the Fifth Circuit agreed to its inclusion in the Court's opinion.

It was likewise entirely appropriate for the District Court in the Avitts case (whose decision was vacated on other grounds) to observe:

> [A]t some point the fields' arguable proximity to the drainage systems which ultimately fed into navigable waters only after great distance will provide simply too remote a threat to bring the action within the strictures of the OPA.

Avitts, 840 F.Supp. at 1122.

The case before this Court extends far beyond a creek adjacent to the Gulf which this Circuit considered in Avitts. The present case arises near Amarillo which, as the District Court explained, is more than 500 miles from any ocean or shoreline. (District Court Order, Sept. 30, 1999, at 11.) Application of the OPA to the Amarillo situation is unquestionably beyond the scope of the OPA.

The District Court for the Northern District of Texas properly concluded, in the context of the Amarillo facts before it, that "it is clear from the legislative history and the few published OPA decisions discussing 'navigable waters' that application of the Act to an onshore production facility that is over 500 miles from any ocean or shoreline is an expansion that Congress did not intend." Rice v. Harken Exploration Co., No. 97-402 (N.D. Tex. Sept. 30, 1999), at 11.

Deference to an agency's interpretation of a statute, as described in Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984) and discussed in the *amici* briefs of the United States and the State of Texas, does not mean that the Court should accede to an agency's efforts to rewrite the statute. Moreover, the United States ignores the OPA regulations by the National Oceanic and Atmospheric Administration ("NOAA;" 15 CFR 990.30). These regulations do not include the broad language set forth in EPA's NCP regulations -- regulations which also were for purposes of a different statute (CERCLA).

The State of Texas already has broad statutory authority to protect against oil contamination (see discussion below) and there is nothing in the OPA which prevents the State from taking further action in this area. In fact, as the Conference Report states, both the House and Senate versions of the OPA contain "generally similar provisions preserving the authority of any State to impose its own requirements or standards with respect to discharges of oil within that State." 1990 U.S.C.C.A.N. at 799.

The State of Texas' *amicus* brief indicates that the real reason the brief was filed was so that the State's Natural Resources Division (the "Division") might entice this Court into broadly construing the OPA so that the Division can have authority which the Texas legislature has elected not to provide. Thus, the Division claims that affirmance of the District Court opinion "would seriously

undermine the state's ability to pursue NRD claims for inland spills." (State of Texas *Amicus* Brief, at 2.)

However, the Division concedes that there is ample existing Texas statutory authority to protect against oil-related contamination. Specifically, the Division concedes that "Texas law allows for the recovery of civil penalties and injunctive relief for oil spills anywhere in the state." (Id. at 2 and 6.) Moreover, buried in a footnote, the Division further concedes that "[o]il spills that pollute surface or subsurface water are violations of Rule 8(b) of the Railroad Commission of Texas." (Id. at 6, n.19.) Likewise, appellant's Reply Brief concedes that the Railroad Commission has authority to address the alleged contamination which is the subject of appellants' claims. (Id. at 8.) Notably, the Division's *amicus* brief does not state that it is filed on behalf of the Railroad Commission, which is the state agency with primary jurisdiction over Texas oil and gas operations. Appellants need only convince the Railroad Commission, the State's expert in regulating and balancing the varying interests in oil and gas matters, that their claims have merit.

It is evident that the Natural Resources Division wants to expand its jurisdiction. (Id. at 3, n. 4.) This Court should not allow itself to be used as a vehicle for the Natural Resources Division to modify the jurisdictional lines which have been established by the Texas legislature. Appellants' belief that the OPA

provides for strict liability, remediation, and attorney fees (Reply Brief at 22-27) has prompted them to seek to supplement remedies available under Texas common law by seeking federal court extension of the OPA to Amarillo -- far beyond the substantial threat of major oil spills in the oceans and coastal waters which the OPA was intended to address. This Court should squarely reject these efforts.

This case is not an appropriate vehicle for this Court to make fundamental decisions which adversely affect U.S. energy policy, and an extension of the OPA to appellee's operations in Amarillo would do just that. Such an extension is beyond the scope of the OPA, not in the best interests of the energy-consuming public in the United States and the State of Texas, would subject the federal courts to a litany of claims, and would impose a substantial burden on independent producers and further hamper their ability to ensure the continued availability of an adequate supply of domestic oil and gas.

CONCLUSION

The thousands of U.S. oil and natural gas exploration and production companies who are represented by *amici* respectfully submit that, because appellants' sworn interrogatory responses assert damages only to soil and groundwater, this Court can and should affirm the District Court's summary judgment ruling without addressing whether the scope of the OPA is as broad as the scope of the Clean Water Act. If the Court decides that it is necessary to

address the OPA's scope, *amici* respectfully submit that the OPA was never intended to extend to the remote land and groundwater which is at issue in this litigation.

Respectfully submitted,

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Dated: April 27, 2000

CERTIFICATE OF SERVICE

I hereby certify that paper and electronic copies of the BRIEF FOR AMICUS CURIAE IN SUPPORT OF APPELLEE ON BEHALF OF INDEPENDENT PETROLEUM ASSOCIATION OF AMERICA, TEXAS OIL AND GAS ASSOCIATION, TEXAS INDEPENDENT PRODUCERS AND ROYALTY OWNERS ASSOCIATION, AND THE NORTH TEXAS OIL & GAS ASSOCIATION SUPPORTING AFFIRMANCE OF THE DISTRICT COURT were sent this ___ day of April, 2000, by U.S. first class mail, postage prepaid, to:

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REVISED CERTIFICATE OF COMPLIANCE

Pursuant to 5th Cir. R. 32.2 and .3, the undersigned certifies that this brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7).

1. EXCLUSIVE OF THE EXEMPTED PORTIONS IN 5th Cir. R. 32.2, THE BRIEF CONTAINS 3,867 words.

2. THE BRIEF HAS BEEN PREPARED in proportionally spaced typeface using Microsoft Word 98, in the following typeface name and font size: Times New Roman, 14 pt.

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_____

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